IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

S.T.Rev.No.439 of 2004

T.A.No.584/2001 OF KERALA SALES TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH-II, ERNAKULAM (ORDER DATED 30-4-2004)

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REVISION PETITIONER/APPELLANT/APPELLANT/ASSESSEE:-

SMT.LALITHA JAIN,
3 WOOD STREET,
6TH FLOOR,
CALCUTTA.

BY ADVS. SRI.V.V.ASOKAN &
SRI.SUNIL SHANKAR.

RESPONDENT/RESPONDENT/RESPONDENT/REVENUE:-

STATE OF KERALA,
REPRESENTED BY DEPUTY COMMISSIONER (LAW),
COMMERCIAL TAXES,
ERNAKULAM.

BY SENIOR GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 29/11/2007, ALONG WITH STRV.No.440 OF 2004 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

H.L.Dattu,C.J. & K.M.Joseph,J.

S.T.Rev.Nos.439, 440, 441, 442, 443, 444, 445 & 446 of 2004

Dated, this the 29th day of November, 2007

ORDER

H.L.Dattu,C.J.

Smt. Lalitha Jain is the petitioner in all these revision petitions.

(2) The assessment years in question are 1985-86 to 1988-89. The assessing authority has completed the assessments for the aforesaid assessment years, both under the Kerala General Sales Tax Act, 1963 ("KGST Act" for short) and Central Sales Tax Act, 1956 ("CST Act" for short).

(3) M/s.Jayanthilal & Company, in the petition it is stated, constituted by four partners, viz., Sri.Rajan Sanklechha, S/o.Sri.Sivlan Sanklechha, Sri.Sampathlal Jain, S/o.Rathanlal Jain (late), Smt.Lalitha Jain, W/o.Anand Raj Jain, and Smt.Neena Jain, W/o.Sri.Jayanthilal Jain. It is a registered firm, registered before Registrar of Firms, Thiruvananthapuram. It is also a dealer registered both under the provisions of the KGST Act and CST Act. It was carrying on the business in Tea and was on the rolls of Assistant Commissioner of Sales Tax (Assessment)-II, Special Circle (Produce), Mattancherry, Kochi. According to the revision petitioner, she retired from the partnership with effect from 30.6.1985. In aid of this assertion, petitioner has produced Annexure-A, "Deed of retirement" dated 30.6.1985. We will refer to the said deed, a little later, in extenso.

(4) The assessing authority, for the purpose of completing the assessments for the assessment years 1985-86 to 1988-89, had issued Form 50 notice to all the partners of the firm, *inter alia*, directing them to produce the books of accounts, documents, etc. After receipt of the said notice, petitioner

had filed her reply dated 2.8.1993. In that, had brought to the notice of the assessing authority, that by the deed of retirement dated 30.06.1985, she has retired from the partnership firm, and therefore, production of the Books of account for the assessment year 1985-86 to 1992-93 would not arise.

(5) Since the partners did not produce the books of accounts as directed, the assessing authority has proceeded to complete the assessments by way of best judgment assessment, both under the KGST Act and CST Act. The orders so passed by the assessing authority is confirmed by the first appellate authority as well as by the Tribunal. Aggrieved by the common orders passed by the Appellate Tribunal in T.A.Nos.584 of 2001 to 591 of 2001 dated 30.04.2004, the assessee is before us in these revision petitions.

(6) The assessee has raised the following questions of law for our consideration and decision. They are as under:

> *"A). Is not the reasoning of the Tribunal that Form III prescribed under Rule 5 (8) of the KGST Rules which contemplates retirement of partners from a firm, ought to have been filed by the petitioner and that consequent to such failure liable to tax in the capacity as partner unwarranted and improper in as much as the situation in hand is one of dissolution of the firm? Whether compliance of Rule 5 (8) read with Form III is necessary by a partner in the event of dissolution of firm?*
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> *B) Whether the Tribunal was correct in law in proceeding with this case presuming the situation involved in the case as one of retirement of a partner? Is not on a proper interpretation of Ann.A document the situation is one of dissolution of the firm?*
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> *C) Ought not the Tribunal have held that the firm having been dissolved/ceasing to exist on account of three out of four partners disassociating from the business, the revision petitioner cannot be mulcted with the sales tax liability incurred by the remaining partner in continuing with the business subsequent to such*

dissolution? Ought not the Tribunal have held that in the absence of a legislative provision enabling the State to fasten the liability incurred subsequent to the dissolution of the firm on the revision petitioner who exited the firm on dissolution, it was not open by a process of interpretation to impose such liability on revision petitioner?

D) In the alternative, is not the reasoning of the Tribunal that the no intimation had been given to the State regarding dissolution of the firm incorrect and erroneous? Ought not the Tribunal have held that the revision petitioner had presented the facts before the assessing authority and produced evidence thereof including the changes incorporated in the Register of firms, the Income Tax records etc and therefore the assessing authority ought to have accepted the revision petitioner's contention that she was not liable for the liability incurred by the business subsequent to her exiting the partnership on dissolution?

E) Whether the lower authorities are justified in mulcting liability on the petitioner in her capacity as a partner for the subsequent period when in fact she ceased to be the partner with effect from 1-7-85 as borne out by records? Since Sec.21 of the KGST Act purport to cast liability on the partners of the firm whether the lower authorities were justified to mulct the petitioner who had ceased to be the partner with effect from 1.7.85?

F) Is not 119 STC 162 requires reconsideration in as much as it has not laid down the law correctly? Is not Rule 5 (8) and Rule 50 of the KGST Rules directory and not mandatory? Even assuming that these rules are mandatory whether the non compliance thereof would enable the assessing authority to mulct the party for liability for tax under the scheme of the Act and the Rules?"

(7) Sri.Asokan, learned counsel appearing for the petitioner would contend that since the revision petitioner had retired from the partnership on 30.6.1985, the assessing authority was not justified in fastening the tax liability on the petitioner for the assessment years in question.

(8) Sri.Mohammed Rafiq, learned Government Pleader ably

justifies the impugned orders.

(9) In our opinion, the one and only question that would arise for our consideration and decision is whether the assessing authority was justified in fastening the tax liability on the petitioner, though, according to her, she retired from the partnership firm on 30.06.1985.

(10) The first principles that requires to be kept in view are, the burden of proof is on the party who alleges a change in the constitution or the dissolution of the firm. It is on the examination of documents, facts and circumstances it has to be decided whether it is a dissolution or change in the constitution of the firm.

(11) In the present case, for the reasons best known, the assessee has not produced the deed of partnership. She has produced Annexure-A document, which, according to the assessee, is a Deed of Retirement. Under the aforesaid deed, which has come into existence on 30.06.1985, three partners, viz. Sri.Sampathlal Jain, W/o.Ratanlal Jain (late), Smt.Neena Jain, W/o.Jayanthilal Jain and Smt.Lalitha Jain (revision petitioner) alone had retired from the partnership, viz., M/s.Jayanthilal & Company with effect from 1.7.1985. Sri.Rajan Sanklechha continued to be the partner of the firm.

(12) The other clause under the deed of retirement, which requires to be noticed by us, is that the parties have agreed to terminate the said partnership with effect from the close of 30th June, 1985 and from that date the partnership business will be carried on by the continuing partner. The clause in this regard in the deed of retirement reads as under:

> "*Whereas all the parties here to have agreed to terminate the said partnership with effect from the close of 30th day of June, 1985* ***and from that date the partnership business shall be carried on by the continuing partner.***".
>
> (emphasis supplied by us).

(13). The intention of the parties in the deed of retirement appears to be that the continuing partners should continue the business of the firm, without there being any disruption in the business of the firm.

(14). The petitioner along with the revision case has also produced the intimation that was sent to the Registrar of Firms, which would only show that the revision petitioner and other two partners ceased to be partners of the firm with effect from 1.7.1985 and one Mrs.Leela.S.Sanklechha has joined the firm with effect from 1.7.1985. Though the revision petitioner claims she has retired from the partnership, she had not intimated the same to the sales tax authorities within the time prescribed under the Act and the rules frames thereunder.

(15) Keeping in view this factual background, the Tribunal, relying upon Section 21A of the Act read with Rule 5(8)(b) of the KGST Rules, has proceeded to hold that though Smt.Lalitha Jain had retired from the partnership firm, she had not informed of that fact to the registering authority by furnishing the declaration form within thirty days from the date of retirement. The Tribunal has also relied upon the law laid down by a Division Bench of this Court in the case of ***K.P.Nazeer* v. *State of Kerala*** [(2000) 119 STC 162]. The findings and the conclusion reached by the Tribunal in this regard is as under:

> *"Admittedly appellant has not furnished Form No.III as specified in Rule 5 (8)(b). First appellate authority relying on the decision of K.P.Nazeer vs. State of Kerala, 119 STC page 162 held that intimation in a particular manner as prescribed under Kerala General Sales Tax Rules, 1963 was required to be given in case of a claim of retirement. The rule mandates intimation to be given in a particular form within a particular time to the registering authority. It is revealed from the record that such an intimation in the prescribed Form No.III has not been furnished by the appellant regarding the retirement. But the learned counsel appearing on behalf of the appellant has produced before us copies of the Form A (See Rule 5) Register of Firms to substantiate that Lalitha Jain has retired from 1.7.1985 vide notice 2 of 87. Moreover, learned counsel produced assessment order from the Income Tax Department to substantiate that the appellant has retired from the partnership with effect from 1.7.1985. Since the appellant did not inform the registering authority about the retirement in the prescribed form, we are of the view that her claim of retirement from the firm cannot be entertained. Hence the appeals filed for all the years under KGST and CST stands dismissed. We order a*ccordingly.".

(16) Before we consider the issue which we have raised for our consideration and decision, let us notice the relevant provisions of the Act and the Rules.

(17) Section 21A of the Act provides for, the effect of the dissolution of a firm or if the firm's business is discontinued. The said provision is as under:

"**21A. Firm dissolved or business**

discontinued:- (1) *Where any business carried on by a firm is discontinued or where a firm is dissolved, the assessing authority shall make an assessment of the taxable turnover of, and determine the tax payable by, the firm as if no such discontinuance or dissolution had taken place, and all the provisions of this Act, including the provisions relating to levy of penalty or any other amount payable under any provisions of this Act, shall apply, so far as may be, to such assessment and determination.*

(2) *Without prejudice to the generality of sub-section (1), if the assessing authority in the course of any proceedings under Section 19 in respect of any such firm as is referred to in that sub-section is satisfied that the firm was guilty of wilful non-disclosure of assessable turnover, it may direct payment of a penalty in accordance with the provisions of sub-section (2) of that Section.*

(3) *Every person who was, at the time of such discontinuance or dissolution, a partner of the firm and the legal representative of any such person who is deceased, shall be jointly and severally liable, for the amount of tax, penalty or other amount payable, and all the provisions of this Act shall apply, so far as may be, to any such assessment or direction for payment of penalty or other amount.*

(4) *Where such discontinuance or dissolution takes place after any proceedings in respect of any year have commenced, the proceedings may be continued against the persons referred to in sub-section (3) from the stage at which the proceedings stood at the time of such discontinuance or dissolution, and all the provisions of this Act shall, so far as may be, apply accordingly.*

(5) *Nothing in this section shall effect the provisions of Section 20.*"

(18) Rule 5 of the Rules provides for application for registration. Rule 5(8)(b) of the Rules is relevant for the purpose of this case. Therefore, it is extracted.

"If a partner retires without the partnership being dissolved thereby, he shall send to the registering

authority a declaration in Form 3 within thirty days of his retirement, along with a copy of the deed of retirement".

(19) Under Partnership law, a firm is not a legal entity, but only consists of individual partners. But for the tax law, income tax as well as sales tax, it is a legal entity. On the dissolution of the firm, it ceases to be a legal entity. Unless there is a statutory provision permitting the assessment of a dissolved or discontinued firm, there is no scope for assessing the partnership firm which ceases to have legal existence. The Kerala General Sales Tax Act, 1963, has inserted Section 21A of the Act with effect from 1.4.1963, permitting the assessing authorities to make assessment of a dissolved or discontinued firm and determine the tax payable by the firm, as if no such discontinuance or dissolution had taken place.

(20) Rule 5(8)(b) of the Rules would clearly indicate that if a partner retires, but if that is not resulted in the dissolution of the firm, then the partner would intimate the registering authority by filing Form III declaration within thirty days of retirement along with the copy of the deed of retirement. This rule thus makes it clear that the retiring person continues to be liable for payment of tax under the Act, despite dissolution until notice in Form III is furnished to the assessing authority. The effect is that until Form III notice is given to the assessing authority within thirty days of his/her retirement, along with the deed of retirement, the liability under the Act continues. In case no such notice is given, the partner will continue to be liable as such to the Department for any act done by any of the partners which would have been an act of the firm, if done before the dissolution. In the absence of notice of

retirement, the authorities under the Act are entitled to assume that partnership still continues though it has actually been dissolved.

(21) In the instant case, when the partnership firm was constituted, Smt.Lalitha Jain was one of the partners of the firm. According to her, the deed of retirement was drawn on 30.6.1985, and she retired from the partnership with effect from 1.7.1985, but did not inform the registering authority about her retirement from the partnership by filing declaration in Form III within thirty days of her retirement along with a copy of the deed of retirement. In more or less identical situation, a Division Bench of this Court in the case of ***K.P.Nazeer v. State of Kerala,*** (supra), at para 7 has observed:-

> *"On a combined reading of the statutory provisions, position is clear that a partner is liable to pay any tax, fee or other amount under the Act, on his retirement does not cease to be liable for any amount remaining unpaid up to the date of retirement, and he continues to be liable for the tax, fee or other amount remaining unpaid at the time of his retirement and any tax, fee or other amount due up to the date of retirement, though unassessed. Such liability exists notwithstanding any contract to the contrary. The crucial thing, therefore, is the date of retirement. Revenue can know about the retirement only if intimation as required under rule 5 (8) (b) is given. Said Rule requires that (a) the partner, who retires without the partnership being dissolved shall send to the registering authority a declaration in form 3; (b) such declaration is to be given within 30 days of his retirement; (c) the declaration has to be accompanied by a copy of the deed of retirement. Form 3 contains the declaration about retirement. In normal course, revenue is not expected to know as to when a person retires from a partnership unless it has information in that regard in*

the prescribed manner. Therefore, the rule mandates intimation to be given in a particular form within a particular time to the "registering authority", as defined in rule 3(h).".

The Court has further observed that:

"If the statute requires a thing to be done in a particular manner, it has to be done in that manner and not in any other manner. It is now well settled that if a statute prescribes that an act has to be done in a particular manner, that act can be done only in that manner, and in no other manner. If a statute gives a power to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. Taylor v. Taylor (1875) 1 Ch.D.426 quoted in State of Gujarat v. Shantilal Mangaldas AIR 1969 SC 634 and University of Kashmir v. Dr.Mohd. Yasin AIR 1974 SC 238. In Ramachandra Keshav Adke v. Govind Joti Chavare AIR 1975 SC 915 it was observed as follows:

"A century ago, in Taylor v. Taylor (1875) 1 Ch D 426, Ind. App. Jessel, M.R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council in Nazir Ahmed v. Emperor, 63 Ind. App. 372; AIR 1936 PC 253 (2) and later by this Court in several cases, Rao Shiv Bahadur Singh v. State of Vindhya Pradesh (1954) SCR 1098; AIR 1954 SC 322, Deep Chand v. State of Rajasthan (1962) SCR 662; AIR 1961 SC 1527....."

> Similar view was also expressed in Narbada Prasad v. Chhaganlal AIR 1969 SC 395, Parmar Himatsingh Jugatsingh v. Patel Harmanbhai Narsibhai AIR 1974 SC 951 and Birad Mal Singhvi v. Anand Purohit AIR 1988 SC SC 1796."

(22) In view of the above discussion, we are of the opinion that the Tribunal was fully justified in relying upon Rule 5(8)(b) of the Rules and the decision of this Court in *K.P.Nazeer's case* while rejecting the assessee's appeal. Therefore, in our view, the interference with the impugned order is not called for. Accordingly, the questions of law framed by the assessee requires to be answered against the assessee and in favour of the Revenue.

(23) Consequently, all pending interlocutory applications are dismissed.

Ordered accordingly.

H.L.Dattu
Chief Justice

K.M.Joseph
Judge

vku/DK.